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Western Washington (Seattle)

In the Supreme Court of the United States

October Term, 1983

JOHN DEAN, Petitioner

v.

TRANS WORLD AIRLINES, INC., and
AIR LINE PILOTS ASSOCIATION,
INTERNATIONAL, Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

GIROLAMI, EDMONDSON,
POOLE & WOOD
L.S. EDMONDSON
1100 Puget Sound Bank Bldg.
Tacoma, Washington 98402
(206) 272-4205
Counsel for Defendant

HERBERT GELMAN
Attorney at Law
505 American Federal Building
Tacoma, Washington 98402
(206) 383-4611
Attorney for Petitioner

QUESTIONS PRESENTED

1. Whether DEAN's First and Fifth Amendment rights were violated by having to pay union dues for purposes he manifestly objected to when no duty to account or adjust charges was being enforced against the union.

2. Whether the United States Court of Appeals for the Ninth Circuit erred by reversing the District Court's order granting partial summary judgment because the Court failed to consider material facts and failed to recognize controlling cases.

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The Petitioner, JOHN DEAN, respectfully prays that a Writ of Certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit.

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OPINIONS BELOW

The opinion of the Court of Appeals for the Ninth Circuit and the Order of the District Court for the Western District of Washington granting partial summary judgment appear in the Appendix herein.

JURISDICTION

The District Court for the Western District of Washington entered its Order granting partial summary judgment on September 8, 1981, time unknown. The judgment of the United States Court of Appeals for the Ninth Circuit was entered on June 16, 1983, time unknown. An Order denying petitioner's motion for rehearing and suggestion for rehearing en banc was entered on August 25, 1983, time unknown and this Petition for Certiorari was filed within sixty days of that date. This Court's jurisdiction is invoked under Title 28, United States Code, Section 1254.

APPLICABLE CONSTITUTIONAL PROVISIONS AND STATUTES

ORDERS

CONSTITUTION

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STATEMENT OF THE CASE

This is a wrongful discharge case arising under the Federal Railway Labor Act. The District Court granted the wrongfully discharged plaintiff's motion for partial summary judgment or liability and gave a partial remedy by ordering the employee, JOHN L. DEAN (DEAN), immediately reinstated. The defendant union, AIR LINES PILOT ASSOCIATION INTERNATIONAL (ALPA), and the defendant employer, TRANS WORLD AIRLINES (TWA), filed an interlocutory appeal. The United States Court of Appeals for the Ninth Circuit reversed the District Court's grant of summary judgment.

JOHN L. DEAN, plaintiff below and appellee herein, began his employment with TRANS WORLD AIRLINES (TWA), co-defendant below and appellant herein, in February of 1966 as a pilot with the title of First Office (co-pilot). DEAN continued as a valued employee of TWA for more than eleven years. He was discharged in August of 1977 for his alleged delinquency in agency-shop service charges payable to the Air Lines Pilots Association International (ALPA), co-defendant below and co-respondent herein.

DEAN became a member of ALPA in 1966 when he was hired by TWA. In 1972 DEAN decided to resign from ALPA. Citing irreconcilable differences, DEAN elected to "sever all relations with ALPA" and informed ALPA by letter dated September 20, 1972. ALPA slowed the processing of DEAN's resignation while it conducted an investigation. (Stip. Exh. #3.) Foreshadowing future events, DEAN and the union exchanged correspondence, each attempting to persuade the other to reconsider. On February 20, 1973, ALPA approved DEAN's resignation effective September 20, 1972.

In 1975, ALPA and TWA negotiated an agency-shop agreement (hereinafter the agreement) which was incorporated into the ALPA/TWA collective bargaining agreement as Section 3-B. In effect, the agreement allowed ALPA to require, as a condition of continued employment, that non-union regularly assigned pilots pay a "service charge as a contribution for the administration of the Agreement and representation of such pilot." (Stip. Exh. 10.) The agreement outlines procedures to

follow should a non-member pilot become delinquent in the payment of his service charge.

On November 10, 1975, ALPA advised all TWA pilots by letter of the agency-shop agreement. A letter conveying the same information was sent by ALPA on December 19, 1975 to all non-union TWA pilots. (Stip. Exh. 11 & 12.) These letters and the initial service charge billing DEAN with an amount equal to union dues touched off a flurry of correspondence between DEAN and ALPA. Fundamentally, DEAN raised objections to ALPA's use of his service charge for purposes not related to the collective bargaining process.

DEAN first challenged the use of his service charges for purposes unrelated to collective bargaining by letter to ALPA dated March 15, 1976. In that letter, DEAN specifically pointed to the authority of *International Association of Machinists* u *Street, 367 U.S. 740, add to Brotherhood of Railway and Steamship Clerks* u *Allen*, 373 U.S. 113. DEAN requested an accounting and reduction of service charges under the authority of the cited cases. (Stip. Exh. 15.) See Judge McGovern's Findings of Fact and Conclusions of Law, page 2.)

On March 31, 1976, ALPA informed DEAN by letter that "[W]e have discussed the Supreme Court cases mentioned in your letter with legal counsel and are advised that those decisions do not require any alteration in your service charge . . ." (Stip. Exh. 16.) ALPA refused to make any adjustment in DEAN's service charges, even though it did expend funds for purposes wholly unrelated to collective bargaining, including political purposes. (Judge McGovern's Findings of Fact and Conclusions of law, Page 2.) DEAN continued his written demands for an accounting and service charge reduction. In response, ALPA continued to refuse to adjust DEAN's service charge.

In early 1977, DEAN moved his residence from Kansas City, Missouri to Olympia, Washington. Both TWA and ALPA were advised of this change of address. DEAN's December and January ALPA service charge billings were not received on time. DEAN made a payment adjusted to accord with his own best estimates of his service charge obligation. He began sending ALPA ten dollars ($10.00) per month. This practice

continued throughout 1977; with each payment, DEAN repeated his demands that ALPA make an accounting required by *Street* and *Allen* and adjust his service charge accordingly. In reply to DEAN's letter of April 15, 1977, ALPA reiterated its above mentioned position in an undated letter posted on May 5, 1977. (Stip. Exh. 78.)

By registered letter dated June 29, 1977, ALPA mailed to DEAN a 15-day termination notification as required by Section 3-B of the agreement. (Stip. Exh. 82.) This notification was never received by DEAN. The return receipt was signed by Glenn C. Davis, manager of Capitol Lakes Towers where DEAN lived. Mr. Davis and his wife had been specifically instructed by DEAN not to sign for his mail.

DEAN was subsequently terminated by TWA at ALPA's request on August 11, 1977 without any prior notification of the impending termination.

REASONS FOR GRANTING THE WRIT

I

On June 16, 1983, the United States Court of Appeals for the Ninth Circuit reversed a decision rendered by the United States District Court for the Western District of Washington wherein the Honorable Judge Walter T. McGovern granted petitioner DEAN's motion for a partial summary judgment. The Court of Appeals reversed the decision on the grounds that petitioner DEAN did not pursue a proper avenue for redress, characterizing DEAN's good-faith adjustment of his agency-shop obligation as a "self-help injunction." It is important to recognize, as did the Court of Appeals, that JOHN DEAN did not stop making agency-shop payments to ALPA entirely, but merely reduced the amount of agency-shop obligation from an amount equal to full union dues to an amount reflective of his own best estimate of the proportionate share of the costs incurred in the collective bargaining process he is required to pay under the terms of the TWA/ALPA collective bargaining agreement, Section 3-B.

The Court of Appeals errs in its reversal of the District

Court's judgment by failing to consider material facts and controlling cases presented; specifically, the Court of Appeals failed to recognize that JOHN DEAN is obligated to pay only his proportionate share of collective bargaining costs under the terms of the agency-shop agreement and failed to consider its own decisions in *Seay v. McDonnell-Douglas Corp.*, 427 F.2d 996. (9th Cir. 1970.)

It is essential that the Supreme Court recognize that the agreement entered into between TWA and ALPA is not a union-shop agreement, but, rather, an agency-shop agreement. Apparently, the Ninth Circuit did not recognize this fact as evidenced by its referral to DEAN's agency-shop obligation as union dues.

> "If courts cannot enjoin the collection of union dues, then certainly an individual should not be permitted unilaterally to decide to reduce or stop *dues* payment (emphasis added).

Dean v. ALPA and TWA, _____ F. 2d _____, (Ninth Cir. 1983).

> "The differences between membership dues and representation fees are more than a matter of dollars alone. Representation fees are payments for services rendered; membership dues support an institution. The Supreme Court has frequently noted the distinction between a union's "institutional costs" and its expenditures for collective bargaining purposes."

International Union, Etc., v. National Labor Relations Board, 675 F.2d (D.C. Circ.) 1257, 1259 (1982).

Many of the Circuit Courts of Appeal fail to recognize this distinction, creating conflicting authority amongst the Circuits to such a degree that this Court should address the issue.

DEAN, as a non-union member, is bound only by the terms of the collective contract; that is, DEAN is obligated only to pay "a service charge as a contribution for the administration of the agreement and the representation of such pilot." (Stip. Exh. 10.)

At all material times, JOHN DEAN made payments to ALPA for his proportionate share of costs incurred in collective bargaining and administration. In fact, DEAN continued

to fulfill his obligation to ALPA after ALPA breached its duty of fair and equitable representation of DEAN by its outright refusal to account for expenditures not germane to collective bargaining as mandated by *International Association of Machinists v. Street, Id.*

The Court of Appeals cites the following passage from *Street, Id:*

> The [employees] who have participated in this action have in the course of it made known to their respective unions their objection to the use of their money for the support of political causes. However, the union-shop agreement itself is not unlawful. [Citation omitted.] *The [protesting employees] therefore remain obliged, as a condition of continued employment, to make the payments to their respective unions called for by the agreement.*

JOHN DEAN fulfilled any obligation he owed ALPA by his continuous payment of all agency-shop obligations. Only after ALPA wrongfully refused to account to DEAN for expenditures not germane to the collective bargaining agreement, and only after ALPA failed to notify DEAN of his correct obligation, did DEAN, in good faith, reduce his payment to reflect his own best estimates of the proper agency-shop obligation.

The Court of Appeals continues its opinion by citing the following passage from *Allen, supra:*

> lest the important functions of labor organizations under the Railway Labor Act be unduly impaired, *dissenting employees* (at least in the absence of special circumstances not shown here) *can be entitled to no relief until final judgment in their favor is entered.*

Court of Appeals Opinion, pg. 3.

Yet, the Court of Appeals failed to consider any of the special circumstances present in the case at bar.

John Dean began requesting an accounting for expenditures not germane to the collective bargaining agreement with the inception of the TWA/ALPA agency-shop agreement in 1975. In his letters to ALPA, Dean cited the authority of both *Street* and *Allen*. ALPA refused Dean's requests,

however, and informed Dean that ALPA maintained no duty to account. (Stip. Exh. 16.) ALPA persisted in this wrongful refusal for a period of nearly six years, at which time it was forced to disclose political expenditures in pre-trial discovery.

ALPA breached the duty to represent John Dean fairly and equitably when it deceitfully refused to grant Dean's request that it account for its political expenditures and allow Dean to pay his proportionate share of the costs of collective bargaining as authorized by the TWA/ALPA agreement.

The Court of Appeals for the Ninth Circuit recognizes the duty owed to non-union employees by the collective bargaining agent in *Seay v. McDonnell-Douglas*, 427 F.2d 996 (9th Cir. 1972). In *Seay*, the Ninth Circuit was presented with a similar agency-shop agreement.

"It is a duty to represent all of the employees — both members of the union and non-members — in utmost good faith and fairness." Id at 1,000.

> Under this doctrine, the exclusive agent's statutory authority to represent all members of a designated unit includes a statutory obligation to serve the interests of all members without hostility or discrimination toward any, to exercise its discretion in complete good faith and to avoid arbitrary conduct.

Vaca v. Sipes, 386 U.S. 171, 177, 87 S. Ct. 903, 17 L. Ed. 842 (1967).

The ignoring of a grievance may violate the duty. *Id* at 194. The duty is breached when "a union's conduct toward a member of the collective bargaining unit is arbitrary, discriminatory or in bad faith. *Id* at 190.

It is clear under the facts of the case at bar that ALPA breached its duty to represent John Dean fairly and equitably. Not only did ALPA attempt to ignore Dean's requests for an accounting, but, it also purposefully and arbitrarily denied any obligation to do so.

Faced with these arbitrary and discriminatory actions taken by ALPA in bad faith, John Dean recognized that his choices of action were limited. The avenue of redress suggested by the Ninth Circuit would force Dean to expend personal funds to force ALPA to fulfill a duty it was previously

obliged to fulfill. In effect, this avenue of redress penalizes Dean threefold; first, by forcing him to accept ALPA's wrongful refusal to account as requested, second, by forcing Dean to continue making the unlawful payments while, third, expending personal funds to litigate the issue in Federal Court. Not only is this avenue of redress unfair and burdensome to Dean while favoring the party (ALPA) in breach of duty and acting in bad faith, but it is uncalled for under current controlling authority. *See, Brotherhood of Railway and Steamship Clerks v. Allen* supra at 120.

> The court has made clear, however, that the exhaustion requirement is subject to a number of exceptions for the variety of situations in which doctrinaire application of the exhaustion rule would defeat the overall purposes of federal labor relations policy.

Glover v. St. Louis-S.F.R. Co., 393 U.S. 324, 329-30, 89 S. Ct. 548, 21 L. Ed 2d 519 (1968).

Similarly, the Court may consider the special circumstances present in the case at bar so long as the consideration does not defeat the overall purposes of federal labor policy. The policy at issue here is the elimination of the non-union "free-rider" enjoying the benefits of a union negotiated contract while not paying for his proportionate share of the costs of collective bargaining. *See, International Association of Machinists v. Street, Supra.*

The special circumstances this Court must consider begin with the fact that Dean is a non-union member of a collective bargaining unit forced to pay an amount equivalent to union dues as a condition of continued employment; that Dean never stopped paying dues to ALPA, but, merely reduced his payment to reflect his own best estimate of his proportionate share of collective bargaining costs; that the TWA/ALPA agency-shop agreement states that non-union member pilots are required to pay only their proportionate share of costs incurred in collective bargaining; that ALPA breached this agreement and the duty it owed to John Dean to represent him fairly by refusing to account for expenditures non-germane to collective bargaining as mandated by Supreme Court authority and specifically cited to in letters from Dean

to ALPA; and that ALPA caused Dean's termination in bad faith and with unclean hands.

In conclusion, this Court should grant this writ because conflicting authority exists amongst the Circuit Courts of Appeal over agency-shop labor provisions and the duties owed by unions to non-member employees as a result of such provisions; and because confusion exists amongst the Circuits as to what circumstances compel relief for a dissenting non-member employee prior to final judgment.

II

Dean's right to freedom of speech and freedom of association guaranteed by the First Amendment to the Constitution of the United States was violated. Insofar as service charges are used to finance expenditures by a union for collective bargaining, contract-administration, and grievance adjustment purposes, an agency shop agreement is constitutionally valid. *Railway Employee Dep't. v. Hanson*, 351 U.S. 225, 76 S. Ct. 714, 100 L. Ed, 1112 (1956); *International Association of Machinists v. Street*, 367 U.S. 740, 81 S. Ct. 1784, 6 L. Ed. 1141 (1961). However, a union does not have the power, over an employee's objection, to use his exacted funds to support political cause which he opposes. *Street, supra.*

ALPA used funds exacted from Dean for political purposes despite Dean's objections. The union refused to account to Dean for the funds or reduce the payments by the amount used for political purposes. The funds were exacted from Dean under the threat of job dismissal. ALPA's use of Dean's funds for purposes he objected to hindered his right to free speech by forcing him to associate with causes he opposed and by reducing his ability to further his own views.

> "We held in *Street* that Section 2, Eleventh is to be construed to deny the union, over an employee's objection, the power to use his exacted funds to support political causes which he opposes..."
>
> The position taken by the court in *Hanson, Street* and *Allen* is strong medicine. It is not equivocal. Indeed, it contains constitutional overtones which appear to be foregone only by use of statutory construction to avoid First and Fifth Amendment

> issues... the diversion of the employee's money from use for purposes of which it was exacted damages them doubly. The utilization of union dues to support candidates and causes that the plaintiff opposes renders the plaintiff captive to the ideas, association and causes espoused by the union. At the same time, it depletes their own funds and resources to the extent of the expropriation and renders them unable by these amounts to express their own convictions and their own ideas and to support their own causes.

Seay v. McDonnell - Douglas, 427 F. 2d 996,999 (9th Cir. 1970).

The court in *Seay* recognized the potential for violations of individual rights that could occur by requiring payment of service charges from non-member employees. As mentioned above, the *Seay* court also recognized the fiduciary duty of a union to deal fairly and equitably with the people it represents. Although the constitutional issues were not squarely presented in *Seay*, the court nevertheless felt obligated to comment on the potential First Amendment violations. In the case at bar, however, the same court that decided *Seay* failed to consider that case or the issues discussed in it, even though ALPA had blatantly breached it's fiduciary duty and had violated Dean's rights. The constitutional violations not squarely before the Court in *Seay* must be dealt with in this case.

It is important to consider here that Dean was only obligated under the agency shop agreement to pay for his share of the collective bargaining expenses. He was forced to further contribute, however, to purposes he was opposed to under the threat of losing his job.

The principles that under the First Amendment and individual should be free to believe as he will and that in a free society one's beliefs should be shaped by his own mind and conscience prohibit a union from requiring any employee represented by the union to contribute to the support of an ideological cause he may oppose as a condition of holding a job. *Abood v. Detriot Board of Education*, 431 U.S. 209, 97 S. Ct. 1782, 52 L.Ed 2d 261 (1976). The Constitution requires that a union's expenditures for ideological causes not germane to its duties as a collective bargaining representative be financed

from charges, dues, or assessments paid by employees who do not object to advancing such causes and who are not coerced into doing so against their will by the threat of loss of their employment. *id* at 234.

Since Dean paid his dues under the threat of losing his job, the amount he paid above his proportion of the cost of collective bargaining was a wrongful taking of his property without due process. The Fifth Amendment to the Constitution of the United States protects people from being "deprived of life, liberty, or property, without due process of law."

In *Abood, supra*, the agency shop agreement called for non-union members to pay a service charge in an amount equal to union dues for the benefits they received. The court held in that case that even though the agency shop agreement was valid under *Hanson* and *Street* and non-members paid the same amount as members, the union still could not use funds for ideological causes objected to by an employee.

The case at bar requires even stricter scrutiny than that in *Abood*. Dean and other non-members were only obligated to pay for their share of collective bargaining expenses under Section 3-B of the ALPA/TWA Agency shop agreement. They were not obligated to pay a sum equal to union dues as in *Abood*. Therefore ALPA had an even higher duty than the union in *Abood* to deal fairly with persons it represented because the people would receive no benefit from any money they paid in above the amount agreed to under the contract. ALPA breached this high duty and wrongfully deprived Dean of money without due process by forcing him to pay an amount greater than he was legally obligated to pay. Dean not only received no benefit from the tender of the excess amount, but was further damaged by having that money used for causes he was opposed to.

ALPA further violated Dean's Fifth Amendment rights by discharging him for failing to pay the excessive amount. The right to hold specific private employment and to follow a chosen profession comes within the "liberty" and "property" concepts of the Fifth Amendment. *U.S. v. Robel*, 389 U.S. 258, 88 S. Ct. 419, 19 L.Ed. 508 (1967).

The due process clause of the Fifth Amendment, at a minimum, requires that deprivation of life, liberty or property

be preceded by notice and opportunity for hearing appropriate to the nature of the case. *Boddie v. Connecticut*, 401 U.S. 971, 91 S. Ct. 780, 28 L.Ed.2d. 113 (1971). Dean did not receive notice of his termination until after he was discharged and therefore had no opportunity whatsoever for a hearing.

The ALPA/TWA agency shop agreement contains a notice provision, but it was not adhered to. Under Section 3-B of the agreement, Dean had 15 days from the *receipt by him* of notice of termination to make the requested payments. Dean was given 15 days from the date of the letter to make the payments, but he did not receive the letter until after his discharge. Neither ALPA nor TWA made any other attempts to contact Dean. Upon receipt of the letter, Dean immediately tendered the requested amount in order to retain his job, but his tender was refused.

Employees should be given a reasonable time in which to pay the appropriate unions all sums required under the agreement, including arrears, that are owing. *Allen*, 373 U.S. at 120. Even though Dean had already paid all the sums required under the agreement, he should have been given a reasonable opportunity to make the requested payments and retain his employment until the dispute could be resolved in the courts.

CONCLUSION

For the reasons noted above, petitioner prays that this court reverse the decision of the Court of Appeals and reinstate the District Court's Order Granting Partial Summary Judgment.

Respectfully submitted,
Girolami, Edmondson, Poole & Wood

By _____
L.S. Edmondson
Attorney for Petitioner

Respectfully submitted,

By _____
HERBERT GELMAN
Attorney for Petitioner